Filed 8/24/04 Mello v. Omya (California), Inc. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DENNIS FRANK MELLO, Plaintiff and Appellant, v. OMYA (CALIFORNIA), INC., Defendant and Respondent.	E033951 (Super.Ct.No. VCV 025481) OPINION

APPEAL from the Superior Court of San Bernardino County. Robert E. Law (retired judge of the Mun. Ct. for the Central Orange Co. Jud. Dist., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and David Cohn, Judges.[1] Affirmed.

Dennis Frank Mello, in pro. per., for Plaintiff and Appellant.

Seyfarth Shaw and Diana Tabacopoulos for Defendant and Respondent.

Plaintiff Dennis Frank Mello (Mello) appeals from a judgment entered after defendant OMYA (California), Inc.'s (OMYA) motion for summary judgment was granted. He claims that the trial court erred when it concluded that he had not

[1] Judge Law heard and granted OMYA's motion for summary judgment. Judge Cohn signed the judgment in favor of OMYA.

demonstrated the existence of a triable issue of material fact as to each of his three causes of action. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

Mello was hired by OMYA in July 1993 as its packing and shipping manager. In April 1994 he was promoted to production manager. Over the next several years, Mello had two supervisors, both of whom issued warnings to him regarding his job performance. Mello received satisfactory and less than satisfactory comments on his annual performance reviews, which he admits were completed honestly and fairly. Rod Wilton (Wilton) became Mello's supervisor in July 2000. Wilton also criticized Mello's job performance. On May 23, 2001, in response to Wilton's criticism, Mello left work before his normal departure time without giving instructions to any of his subordinates. When he returned the following day, Wilton and other members of management met with Mello to discuss his recent performance and poor attitude. He was suspended without pay pending further investigation. On June 6, 2001, OMYA managers again met with Mello to give him a final written warning containing a list of expectations with respect to his performance, to which he would have to adhere to continue his employment. Mello admitted that he could perform his job as required in the warning but requested time to review it. OMYA gave Mello until June 11, 2001, to respond. However, by June 12, 2001, OMYA had not heard from him. OMYA's human resources department contacted Mello by telephone and Mello stated that he did not wish to return to work at OMYA. This conversation was memorialized in a letter from OMYA to Mello, dated June 12, 2001, which Mello admitted was an accurate reflection of the conversation.

On December 18, 2001, Mello filed a complaint alleging three causes of action including wrongful discharge in violation of public policy, negligent supervision and intentional infliction of emotional distress. On January 8, 2003, OMYA filed its motion for summary judgment or, in the alternative, summary adjudication. After a hearing on February 26, 2003, the trial court took the matter under submission and on March 2, 2003, granted summary judgment on the grounds that Mello had failed to identify any public policy that was violated by his termination, that he had not demonstrated any triable issue of material fact that he was constructively or otherwise discharged, that Mello's negligent supervision and infliction of emotional distress claims were preempted by the Workers' Compensation Act and that he failed to establish a triable issue of fact that those claims arose out of something more than conduct that normally lies within the employment relationship. Judgment was entered on April 11, 2003. This appeal followed.

DISCUSSION

A. *Standard of Review*

The purpose of summary judgment "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844 (*Aguilar*).) Our de novo review is governed by Code of Civil Procedure section 437c, which provides in subdivision (c) that a motion for summary judgment may only be granted when, considering all of the evidence set forth in the papers and all inferences reasonably deducible therefrom, it has been demonstrated

that there is no triable issue as to any material fact and the cause of action has no merit. The pleadings govern the issues to be addressed. (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1121.) A defendant moving for summary judgment bears the burden of persuasion that there is no triable issue. This burden is met by producing evidence that demonstrates that a cause of action has no merit because one or more of its elements cannot be established to the degree of proof that would be required at trial, or that there is a complete defense to it. Once that has been accomplished, the burden shifts to the plaintiff to show, by producing evidence of specific facts, that a triable issue of material fact exists as to the cause of action or the defense. (*Aguilar*, *supra*, 25 Cal.4th at pp. 849-851, 854-855.)

B. *OMYA Shifted the Burden to Mello to Show a Triable Issue of Material Fact*

OMYA demonstrated that none of Mello's three causes of action could be established and therefore lacked merit. We will first discuss OMYA's evidence as it was presented to the trial court on each cause of action. In the following section, we will analyze the evidence Mello presented in an attempt to meet his burden of demonstrating a triable issue.

1. *Wrongful Termination in Violation of Public Policy*

Patently, in order to establish a cause of action for wrongful termination, a plaintiff must demonstrate that the employer terminated the plaintiff's employment. OMYA presented evidence that Mello was not terminated, but rather voluntarily resigned his position by refusing to sign the written final warning memo and accept its terms. OMYA therefore demonstrated that Mello could not establish a necessary element of his

first cause of action.

In addition, while it is widely recognized that "an at-will employee possesses a tort action when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn" (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090, overruled on other grounds as stated in *Green v. Ralee Engineering Co*. (1998) 19 Cal.4th 66, 80, fn. 6 (*Green*)), "[i]n order to sustain a claim of wrongful discharge in violation of fundamental public policy, [Mello] must prove that his dismissal violated a policy that is (1) fundamental, (2) beneficial for the public, and (3) embodied in a statute or constitutional provision. [Citation.] [¶] Tort claims for wrongful discharge typically arise when an employer retaliates against an employee for '(1) refusing to violate a statute . . . [,] (2) performing a statutory obligation . . . [,] (3) exercising a statutory right or privilege . . . [, or] (4) reporting an alleged violation of a statute of public importance.' [Citation.]" (*Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1256, fns. omitted (*Turner*).)

In wrongful termination cases the Supreme Court has "rejected public policy claims that were 'largely unaccompanied by citations to specific statutory or constitutional provisions.' [Citation.] [It] observed that the omission 'puts [the defendant] and the court in the position of having to guess at the nature of the public policies involved, if any.'" (*Green*, *supra*, 19 Cal.4th at p. 83.) OMYA pointed out that Mello's complaint did not identify any statutory or constitutional provision that formed the basis for his claim. Instead, it merely identified "a fundamental policy interest in providing employees with a work place environment free from illicit and wrongful

fabrications made by their employers." Such vague statements, untethered to any specifically named provision are insufficient to survive summary judgment. (*Ibid*.)

OMYA therefore shifted the burden to Mello to demonstrate the existence of a triable issue of material fact as to his cause of action for wrongful termination in violation of public policy.

2. *Negligent Supervision*

Mello claimed that OMYA was liable for negligently supervising Wilton, essentially allowing him to fabricate charges and allegations about Mello's job performance in order to get him fired. OMYA demonstrated that such claims, which are based on conduct that normally occurs in the workplace, are covered by the exclusive remedies provided in the Workers' Compensation Act. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 17-20 (*Shoemaker*).) Thus, OMYA showed that Mello cannot establish every element of this cause of action such that he could successfully maintain it at trial.

OMYA also showed that there is no tort claim for negligence independent of a wrongful termination charge with respect to an employer's actions leading up to the discharge of an employee. (*Hine v. Dittrich* (1991) 228 Cal.App.3d 59, 63-65.) As in *Hine*, Mello's only allegation of damage that resulted from OMYA's negligence was that he was wrongfully terminated. Thus, his sole remedy is for breach of the employment contract and he may not maintain a separate cause of action for negligence. (*Ibid*.)

Finally, OMYA demonstrated that in order for it to be held liable, Mello had to show that it knew or should have known that Wilton created a risk of injury to Mello and that injury occurred. (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) It

pointed out that Mello admitted that other than micromanaging, Wilton was a fair manager and a fairly honest individual. OMYA then argued that Mello has no evidence that would tend to demonstrate that it had knowledge that Wilton posed any risk. The fact that Mello believed that Wilton was a fair manager and a fairly honest man does not show that OMYA did not know that he posed a risk to Mello. Further, simply alleging that Mello has no evidence does not meet the burden of persuasion imposed in order to shift the burden to the party opposing summary judgment to demonstrate a triable issue. Rather, the moving party must produce some evidence, for instance, discovery responses indicating that no evidence can be produced by the opposing party. (*Aguilar*, *supra*, 25 Cal.4th at pp. 849-851, 854-855.)

While this third basis argued by OMYA is not sufficient to shift the burden to Mello to demonstrate the existence of a triable issue of material fact as to his cause of action for negligent supervision, the first two bases were sufficient for the reasons stated above.

3. *Intentional Infliction of Emotional Distress*

Mello claimed that the conduct of OMYA and its employees was intentionally performed with a conscious disregard for his well-being and that he suffered "great emotional and mental suffering, distress, anger, anxiety, worry, shame, humiliation, [and] loss of self-esteem" as a result. OMYA demonstrated that Mello's claim for intentional infliction of emotional distress based upon acts that occurred in the workplace is also covered by the exclusive remedies provided in the Workers' Compensation Act. (*Cole v. Fair Oaks Fire Protection Dist*. (1987) 43 Cal.3d 148, 155-161 (*Cole*) ["We have

concluded that, when the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability."]; see also *Shoemaker*, *supra*, 52 Cal.3d at p. 25.) Thus, OMYA showed that Mello cannot establish every element of this cause of action such that he could successfully maintain it at trial.

OMYA also argued that Mello could not establish that it had engaged in any outrageous conduct or that he had suffered severe emotional distress, both required elements of his cause of action. (*Cole*, *supra*, 43 Cal.3d at p. 155, fn. 7.) In order to give rise to a cause of action for intentional infliction of emotional distress, the conduct must have "'been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 888.) All of the wrongful conduct alleged by Mello, that Wilton, Mello's supervisor, falsely claimed that Mello had been insubordinate and derelict in his duties in a ruse to terminate his employment, constituted personnel management decisions. Further, Mello testified that the worst thing that OMYA did to him was to terminate his employment without performing an investigation, also a personnel management decision. (Compare *Janken v. GM Hughes Electronics* (1996) 46

Cal.App.4th 55, 79 (*Janken*).) "A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged." (*Id*. at p. 80.)

OMYA also argued that "[s]evere emotional distress means '"emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it."' [Citations.]" (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 1004.) It pointed out that Mello had experienced only occasional nervousness, sleeplessness, irritability and elevated blood pressure and had not sought any professional treatment for those symptoms. OMYA argued that this was insufficient to support a cause of action for intentional infliction of emotional distress as a matter of law because the symptoms are no more than any person would experience upon the termination of one's employment. Thus, OMYA produced some evidence tending to show that Mello could not establish that it engaged in outrageous conduct or that he suffered severe emotional distress sufficient to support a cause of action for intentional infliction of emotional distress.

C. *Mello Failed to Demonstrate the Existence of a Triable Issue of Material Fact*

1. *Wrongful Termination in Violation of Public Policy*

In response to OMYA's claim that Mello voluntarily quit his job and therefore could not establish that he was wrongfully terminated, Mello attempted to establish that his termination was constructive. In other words, he was forced to quit because OMYA made his working conditions intolerable. (*Soules v. Cadam, Inc*. (1991) 2 Cal.App.4th 390, 399 (*Soules*), disapproved on other grounds in *Turner*, *supra*, 7 Cal.4th at p. 1251.)

However, criticism of one's job performance, even if unjustified, has been held insufficient, as a matter of law, to support a claim for constructive termination. (*Soules*, *supra*, 2 Cal.App.4th at pp. 400-401.)

Further, even if Mello could establish a triable issue of material fact that he was constructively discharged, in order to recover for wrongful termination, he still had to identify a statute or constitutional provision embodying a public policy that was violated by his termination. (*Soules*, *supra*, 2 Cal.App.4th at p. 399.) On this point, Mello claimed that he was "terminated in retaliation for maintaining that certain products could not be produced by [OMYA], because the certification of those products would have to be falsified. . . . Further, [Mello] was terminated because he criticized the failure of Wilton, and thus [OMYA], to meet the requirements of the State of California for testing various products produced by [OMYA] . . . ." However, California courts have rejected such vague references as unsatisfactory. As we have already observed, in wrongful termination cases the Supreme Court has "rejected public policy claims that were 'largely unaccompanied by citations to specific statutory or constitutional provisions.' [Citation.] [It] observed that the omission 'puts [the defendant] and the court in the position of having to guess at the nature of the public policies involved, if any. This kind of showing is plainly insufficient to create an issue of *material* fact justifying a trial on the merits of [the plaintiff's] claims.' [Citation.]" (*Green*, *supra*, 19 Cal.4th at p. 83, original italics, first bracketed insertion added.)

Because at no time during this litigation has he identified any specific statutory or constitutional provision embodying a public policy that he claims to have been violated

by his termination, Mello has failed to establish the existence of any triable issue of material fact as to his cause of action for wrongful termination in violation of public policy.

2. *Negligent Supervision*

Mello did not make any argument in his opposition below in support of his cause of action for negligent supervision. Nor did he make any attempt to support that claim at oral argument before the trial court. On appeal, Mello simply states that the evidence of negligence is pronounced throughout the record, but provides no citations thereto. Under such circumstances, we must conclude that Mello did not meet his burden of demonstrating the existence of a triable issue of material fact as to his cause of action for negligent supervision.

3. *Intentional Infliction of Emotional Distress*

Mello argued that when an employer's conduct exceeds the risks inherent in the employment relationship, a claim for intentional infliction of emotional distress will not be preempted by the Workers' Compensation Act. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 755-756.) He then stated that he had been a loyal and dedicated employee of OMYA for eight years. "Then, because he criticized the failure to comply with California law, and because he criticized the inability of the facility to produce certain materials without falsification of data he was terminated." This conduct, he concludes, was sufficiently outrageous to take it outside the purview of the Workers' Compensation Act. On the contrary, even if Mello's evidence was accepted, it still establishes only that OMYA's actions against him were those that are normally a part of the work

environment, such as criticizing his job performance, personality conflicts, disagreements over proper procedures, micromanagement, and failure to follow proper procedures. Even if such actions are undertaken in a manifestly unfair or outrageous fashion, the exclusive Workers' Compensation Act remedy applies. (*Shoemaker*, *supra*, 52 Cal.3d at p. 25; *Cole*, *supra*, 43 Cal.3d at pp. 155-161; *Janken*, *supra*, 46 Cal.App.4th at pp. 79-80.) Thus, Mello did not establish the existence of a triable issue of material fact as to his cause of action for intentional infliction of emotional distress. The trial court did not err in granting summary judgment.

DISPOSITION

The judgment is affirmed. Defendant to recover its costs on appeal.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

WARD
J.